that Form 16D is one of the many forms provided in the First Schedule to the NLC, we fail to see in what manner the respondent's two notices in Form 16D had materially contravened the additional provisions in the Tenth Schedule. Having regard to the provisions of section 4(3) and 62 of the Interpretation Act, we find no merit in the argument of counsel for the appellant that the learned Judge erred in holding that the two notices had complied with Form 16D and were therefore effective and good in law.

On the second ground, it is appellant's argument both here and in the court below that by citing the two charges in both notices and by lumping together the outstanding sum due under both charges, the appellant/chargor would not know how much was exactly due under each of the two charges. In concluding the appellant's objection to be purely technical, the learned Judge relied on the judgment in *Tan Kai Kok* v. *Thor Teik Seng.*[1] In that case Burton, J. refused to deal with a purely technical objection that the chargee had failed to specify the time to remedy the breach in the notice of default, on the ground that it misled no one and would not avail to set aside an order otherwise good. Before us, it is also argued that the defect is substantial enough to prejudice the appellant to rectify the breach. In our view, whether a notice of default with respect to a charge or charges in Form 16D is bad in law would depend on whether the chargor has been prejudiced or misled by any defect in the notice so as to render the granting of the order of sale unjust, and this in turn must necessarily depend on the circumstances of each particular case. Now, what were the circumstances of the present dispute? Although there were two charges, they related to the same land; the same parties were involved; and the overdraft facilities were kept in one and the same account in respondent's bank. It would appear that the second charge was created in order to secure the increase in the limit of the overdraft facilities from $400,000/- to $580,000/- and as such it must be difficult to apportion as to which sum due was referable to which charge, unless the appellant had requested for a separate account in the bank for each charge. As the appellant knew all along that he had only one account with the respondent for the two charges, there was no way how it could have been prejudiced or misled. Merely because the two notices contained both the charges and the amount due from both was combined, it could not be said on balance that the appellant was thereby prejudiced or misled. The breach and non-compliance with the notices had been admitted, and so was the total amount due from both the charges. There was no evidence that the appellant had ever sought information from the respondent how much was due from each charge so as to enable him to make separate repayments. But the fact remained, even after the letter of demand dated October 9, 1980 (exhibit "MBB 1") was served, the appellant did not show any intention to rectify the breach, nor during the remedial period of one month after service of the two statutory notices. Further, there was not an iota of evidence that the respondent had at any time tried to mislead or prejudice the appellant. There was therefore nothing unjust in the order of sale being granted by the Collector. In the circumstances of this particular case we find that the appellant's second ground must also fail.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Ng Ek Teong & Partners; Shook Lin & Bok.*

TRACTORS MALAYSIA BHD. v. SOUTHERN ESTATES SDN. BHD. & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi & Syed Agil Barakbah F.JJ.) October 12 & December 28, 1983]

[Kota Kinabalu – Federal Court Civil Appeal No. 146 of 1982]

Practice & Procedure – Appeal – Appeal against order made in chambers – No application made for further argument in court – When time for appeal begins to run – In absence of certificate by Judge that he requires no further argument time for appeal begins to run from date when order was pronounced – Mistake of solicitor – Rules of Federal Court 1980, r. 56A – Courts of Judicature Act, 1964, s. 68(2).

In this case the disputes arose out of nineteen agreements under which the appellants had allegedly sold under hire-purchase 19 Caterpillar logging equipment to the first respondent company on the guarantee of the second respondent. In Civil Suit 189 of 1969 the appellants obtained summary judgment against the first respondent for the sum of $959,896.92 and in Civil Suit 190 of 1969 they obtained a consent judgment against the second respondent for the sum of $718,266.85. The second respondent filed a claim to set aside the consent judgment but on appeal to the Privy Council, the appellants suceeded in restoring a High Court order of dismissal of respondent's claim. Both respondents then brought an action to set aside the

summary judgment in Civil Suit No. 189 of 1969 and the consent judgment in Civil Suit No. 190 of 1969 on the ground of fraud. The appellant took out a summons-in-Chambers to strike out the respondent's statement of claim on a plea of *res judicata* and on the ground that both the summary and consent judgments could not be set aside for fraud allegedly discovered after a lapse of eleven years. B.T.H. Lee J. dismissed the appellant's application on January 20, 1979. The appellants did not apply for further argument but on May 17, 1982 obtained leave from Wan Mohamed J. to appeal to the Federal Court under section 68(2) of the Courts of Judicature Act, 1964. The notice of appeal was filed on May 28, 1982. On July 15, 1982 the appellants applied for an order that they be given leave to appeal pursuant to rule 56 of the Rules of the Federal Court, 1980 by having the time for the filing of the notice of appeal extended. Counsel for the respondent argued that the notice of appeal must be filed within one month of the date of the order. He also contended that the appellant's application for leave to appeal out of time could not succeed as the ground relied on was based on a mistake of law by the appellant's solicitors.

Held: (1) there is no conflict between section 68(2) of the Courts of Judicature Act, 1964 and rule 56(a) of the Rules of the Federal Court, 1980. Section 68(2) deals with non-appealable matters whereas rule 56 governs the time limit for filing notice of appeal. An appeal against an order in Chambers to the Federal Court is not properly brought unless firstly the case is appealable under section 68 and secondly the notice of appeal was filed within the time prescribed by rule 56(a);

(2) the net result of the two provisions is that in the absence of a certificate, time for appeal starts to run from the date when such order was pronounced at the hearing;

(3) in this case the notice of appeal filed was clearly well out of time and it is necessary for the appellants to proceed with the motion for leave of the full court to extend the time before the appeal can be heard;

(4) the mistake of the appellant's solicitors on a point of law cannot constitute sufficient grounds for granting the extension of time to file notice of appeal. As there were no special grounds shown for the court to exercise its discretion under rule 56(a) of the Rules of the Federal Court, 1980, this was not a proper case in which extension of time should be allowed;

(5) as the appeal was not properly brought, the court had no alternative but to dismiss it with costs.

Cases referred to:

(1) *Tractors Malaysia Bhd.* v. *Tio Chee Hing* [1975] 2 M.L.J. 1.

(2) *Bank of America National Trust and Savings Associations* v. *Chai Yen* [1980] 1 M.L.J. 198.

(3) *Sri Jaya Transport Ltd.* v. *Fernandez* [1970] 1 M.L.J. 87, 88 and 89.

(4) *Gan Hay Chong* v. *Siow Kian Yuh & Anor.* [1975] 2 M.L.J. 129.

(5) *Hoe Joo Sawmills* v. *Sigma (Air Conditioning Sdn. Bhd.)* [1979] 2 M.L.J. 236.

FEDERAL COURT.

C. Abraham for the appellants.
R.R. Sethu for the respondents.

Mohamed Azmi F.J. (delivering the Judgment of the Court): The dispute in this appeal arose out of nineteen agreements dated October 1, 1967, under which the appellants had allegedly sold under hire-purchase 19 Caterpillar logging equipment to the first respondent company on the guarantee of the second respondent. In Civil Suit No. 189 of 1969, the appellants obtained under Order 14 RSC 1957 summary judgment against the first respondent for the sum of $959,896.92 on December 27, 1969, and on the same date they also obtained a consent judgment for the amount of $718,266.85 against the second respondent vide Civil Suit No. 190 of 1969. By Civil Suit No. 199 of 1972, the second respondent filed a claim to set aside the consent judgment in Civil Suit No. 190 of 1969. On appeal to the Privy Council, the appellants succeeded in restoring a High Court order of dismissal of respondents' claim – see *Tractors Malaysia Bhd.* v. *Tio Chee Hing.*[1] Both respondents then brought the present suit (Civil Suit No. 190 of 1978) to set aside the summary judgment in Civil Suit No. 189 of 1969 and as well as the consent judgment in Civil Suit No. 190 of 1969 on ground of fraud which they alleged was only discovered in June 1977. It is their case that between October, 1967 and June, 1977, fraud had been practised against them in that they were misled into believing that the 19 agreements were hire-purchase agreements when in fact they were only hire agreements. The appellants took out a Summons-in-Chambers dated April 24, 1978 to strike out the respondents' statement of claim on a plea of *res judicata* and on the ground that both the summary and consent judgments of 1969 could not be set aside for fraud allegedly discovered after a lapse of about 11 years. B.T.H. Lee J. found for the respondents and dismissed the appellants' application on January 20, 1979. Hence the present appeal by the appellants against the dismissal of their Summons-in-Chambers.

At the outset of this appeal however, our attention was drawn by Mr. Sethu, Counsel for the Respondents, to the appellants' notice of motion filed on July 15, 1982 in which the appellants had applied for an order that they be given leave to bring their appeal pursuant to the provisions of rule 56 of the Rules of the Federal Court 1980 by having the time for the filing of the notice of appeal extended. In reply, counsel for the appellants, Mr. Abraham, intimated to us that the application for leave of this court was in fact and in law unnecessary, as the appellants had obtained leave under Section 68(2) of the Courts

of Judicature Act 1964 (Revised 1972) from Wan Mohamed J. on May 17, 1982 to appeal to the Federal Court (see page 105). Since notice of appeal was filed on May 28, 1982 (page 106), rule 56 of the Rules of the Federal Court had been complied with because, according to Mr. Abraham, the time limit for appeal which is one month, would commence from the date of obtaining leave, and as such the present appeal had been properly brought before this court. Mr. Sethu however argued that notice of appeal must be filed within one month of January 20, 1979 – the date of B.T.H. Lee's order and not of May 17, 1982 – the date of procuring leave from Wan Mohamed J. He further contended that even if the appellants' notice of motion were proceeded with, the application for leave to appeal out of time could not succeed, as the ground relied upon in the affidavit in support of the application was based on a mistake of law by the appellants' solicitors.

From the submissions of counsel for both parties, it is clear that what we have to determine in whether the present appeal has been properly brought before us. On the necessity of the appellants' notice of motion for extension of time, it is essential to consider the provisions of Section 68(2) of the Courts of Judicature Act, rule 56(a) of the Rules of the Federal Court and also Order 54 rule 22A of the repealed Rules of the Supreme Court 1957 which though in force on the date of B.T.H. Lee's order in 1979 was no longer so when notice of appeal was filed in 1982. Section 68(2) of the Act as amended with effect from February 23, 1982 by Act A530 provides:-

"No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court."

Whereas rule 56(a) Rules of the Federal Court which was amended in August 1980 by P.U.(A) 222 as a result, we believe, of Privy Council decision in *Bank of America National Trust and Savings Associations* v. *Chai Yen*,[2] provides:-

"No appeal shall, except by leave of the full court, be brought after the expiration of one month –

(a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced at the hearing or after the hearing in open court or after the issue of the certificate by the Judge that he requires no further argument, *whichever is the later* or when the appellant first had notice thereof" (the emphasis is ours).

Order 54 rule 22A RSC 1957 (now omitted in Order 32 rule 11 Rules of the High Court 1980) provides as follows:-

"Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into court for further argument; and on such application, the Judge may either adjourn the matter into court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument he may set aside the order previously made and make such other order as he thinks fit."

If there is a conflict between Section 68(2) of the Courts of Judicature Act which came into force on March 16, 1964 and Order 54 rule 22A RSC 1957, then by virtue of Section 4 of the Act, the provision of section 68(2) shall prevail. By the same token, it cannot however he argued that if there is a conflict between Section 68(2) and rule 56(a) of the Rules of the Federal Court which was made under Section 17 of the Act, the statutory provision cannot prevail over the rule merely because the rule as amended was made subsequent to the Act. But in truth there is no conflict at all between Section 68(2) and rule 56(a). Section 68(2) deals with non-appealable matters whereas rule 56 governs the time limit for filing notice of appeal. An appeal against an order in Chambers to the Federal Court is not properly brought unless firstly the case is appealable under Section 68 and secondly the notice of appeal has been filed within the time prescribed by rule 56(a). The order is only appealable if the aggrieved party has fulfilled one of the conditions imposed by Section 68(2). In the instant case, there is no dispute that the order appealed against is an order made by a Judge of the High Court in Chambers on January 20, 1979. The net result of the two provisions is that in the absence of a certificate, time for appeal starts to run from the date when such order was pronounced at the hearing. Although under Section 68(2) an aggrieved party has three options i.e. either comply with the four-day rule and apply for a certificate from the Judge who made the order, or apply for leave from the Federal Court or from a Judge of the High Court, he must face the different consequences imposed by rule 56(a) as to when the one-month period of appeal would commence. The words "whichever is the later" in rule 56(a) seem to suggest that the safest procedure for an appell-

ant would be to comply with the four-day rule and apply for a certificate unless the appellant can rush through within one month from the date when such order was pronounced not only the process of obtaining leave but also the filing of the notice of appeal. As regards the third option, we find no substance in Mr. Sethu's submission that the words "from a Judge of the High Court" should be interpreted as meaning the same Judge who made the order appealed against. We rule that "a Judge of the High Court" under Section 68(2) means any Judge of the High Court of competent jurisdiction. As such the fact that the order in Chambers was made by B.T.H. Lee J. does not prevent Wan Mohamed J. or any other High Court Judge from granting the leave. But for reasons already stated, what is fatal in this case is the failure of the appellants to comply with rule 56(a) in not filing their notice of appeal within the time prescribed by the rule. On the facts of the present case, time for appeal would run from the date when the order in Chambers was pronounced (January 20, 1979) and not one month of obtaining leave from Wan Mohamed J. (May 17, 1982). Thus, notwithstanding compliance with section 68(2), the appellants have failed to comply with rule 56(a) as to the time limit for appeal. The notice of appeal filed on May 28, 1982 was clearly filed well out of time and we are therefore of the view that it is necessary for the appellants to proceed with the motion for leave of the full court to extend time before the appeal can be heard.

We now turn to the next question as to whether we should allow appellants' motion for leave to extend the time for filing the notice of appeal on the assumption that the motion had not been abandoned. In the affidavit in support of the notice of motion by Mr. John Kah, an advocate and solicitor having the personal conduct of the appellants' case, sworn on June 22, 1982 it is affirmed under paragraph 3 that –

"The Advocates for the Appellants relying on the state of the law as it then existed namely the decision of *T.O. Thomas* v. *K.C.I. Reddy* [1974] 2 M.L.J. page 87 and *Sri Jaya Transport Co. Ltd.* v. *Fernandez* [1970] 1 M.L.J. page 87 did not apply for further arguments within the meaning of Order 54 Rule 22A of the Rules of the Supreme Court 1957. However, on taking further advice Advocates for the Appellants were then advised to seek leave of the High Court pursuant to the provisions of Section 68(2) of the Courts of Judicature Act 1964."

In the Federal Court we rule that mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time to file notice of appeal. For this legal proposition we have considered the decisions of this court in *Sri Jaya Transport Co. Ltd.* v. *Fernandez*;[3] *Gan Hay Chong* v. *Siow Kian Yuh & Anor.*[4] and *Hoe Joo Sawmills* v. *Sigma (Air Conditioning) Sdn. Bhd.*[5] The notice was filed more than three years out of time. As there are no special grounds shown for this court to exercise its discretion under rule 56(a), we find this is not a proper case in which we should allow for extension of time.

As this appeal is not properly brought before this court, we have no alternative but to dismiss it with costs. As a consequential order, the appellants' notice of motion to amend the record of appeal dated September 30, 1982 is also dismissed.

Appeal dismissed.

Solicitors: *Jayasuriya Kah & Co,; Solibun & Golokin.*

GOH SOON ANN v. SANDVIK MALAYSIA SDN. BHD.

[F.C. (Salleh Abas C.J. (Malaya), Seah & Syed Agil Barakbah F.JJ.) August 24, 1983 & January 4, 1984]
[Kuala Lumpur – Federal Court Civil Appeal No. 158 or 1981]

Contract – Sale of goods – Claim for goods sold and delivered – Goods not delivered to alleged buyer but to another address at direction of salesman – Whether salesman agent of buyer – Whether goods delivered to salesman as agent for the buyer – Contracts Act, 1950, s. 71.

In this case the respondent was a wholesaler dealing in steel saws, tools and other hardware products and the appellant was one of his customers. The respondent sued the appellant for goods sold and delivered but when it appeared in evidence that the goods were not delivered to the appellant but were delivered on the direction of the salesman to another address, the respondent amended the statement of claim to read as follows:–

(a) The plaintiff's claim against the defendant is for the recovery of $140,036.13 for goods sold and delivered as evidenced by invoices Nos. C2038, C1950, C1226, C1057, C1271, C2198 and C2947 by the plaintiff to Tan Boon Soon as agent for the defendant.

(b) Further or alternatively, the plaintiff delivered the said goods to the said Tan Boon Soon as agent for the defendant not intending to do so gratuitously and the